

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF PENNSYLVANIA  
CIVIL DIVISION

DION & GOLDBERGER,	:	
	:	
Plaintiff,	:	
	:	
vs.	:	Civ. Action No. 02-cv-5298
	:	
SOUTHEASTERN PENNSYLVANIA	:	
TRANSPORTATION AUTHORITY,	:	
	:	
Defendants.	:	

AMENDED BRIEF IN RESPONSE TO 12(b)(6) MOTION TO DISMISS<sup>1</sup>

I. PRELIMINARY STATEMENT

The defendant's motion to dismiss<sup>2</sup> is not well-taken because the defendant's position that it is shielded by sovereign immunity and a labor contract in this case flies in the face of public policy and the federal and state laws which protect us all from discrimination in the workplace.

To the contrary, the U.S. Supreme Court has continually held that a state may not lessen the availability of a federal civil rights statute "by taking any action purportedly frustrating its application." Howlett v. Rose, 496 U.S. 356, 110 L. Ed.2d 332,

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<sup>1</sup>This brief is submitted in place of the original which was a first draft without supporting case law which was inadvertently filed on August 13, 2002.

<sup>2</sup>Plaintiff filed a Motion to Remand this matter to Philadelphia Court of Common Pleas due to defendant's improper removal to this Honorable Court. Hence, plaintiff respectfully requests that the merits of the instant motion not be considered until the pending Motion to Remand is ruled upon.

110 S.Ct. 2430; See Also Schnupp v. Port Authority of Allegheny, et al, 710 A.2d 1235 (Pa.Commw. 1998).

Specifically, defendant would like this Honorable court to accept that it can bully its employees at union grievance hearings into giving up federally mandated rights to be free from discrimination in the workplace granted to them pursuant to the U.S. Constitution and Title VII. To allow such an injustice would be tantamount to giving license to the Commonwealth and its various agencies to lawfully coerce people who file legitimate employment discrimination complaints, in a closed union grievance hearing room, where private counsel is disallowed, into giving up their rights without the benefit of conferring with private counsel, which is exactly what occurred in this case.

## II. FACTS STATED IN PLAINTIFF'S COMPLAINT

On or about December 11, 2000, plaintiff, Dion & Goldberger, was retained to represent a third party named Kimberly Harris in a religious discrimination claim against the defendant stemming from her termination from employment on or about August 16, 2000.

In furtherance of their representation of Ms. Harris, plaintiff spent valuable time and resources consulting with Ms. Harris, researching issues, preparing for and attending her unemployment compensation hearing which stemmed out of the aforesaid termination, drafting a Charge for Discrimination which

was dual filed with the EEOC and PHRC and other services. See

In or about March 2001, Ms. Harris attended a union grievance hearing regarding the aforesaid termination. Plaintiff was not permitted to attend. However, plaintiff's partners instructed Ms. Harris not to sign any papers until consulting with plaintiff first.

At the aforesaid union grievance hearing, defendant proposed to reinstate Ms. Harris in exchange for her agreement to settle her religious discrimination claim. Ms. Harris informed defendant that she had to call plaintiff first. However, after unsuccessfully trying to call plaintiff, Ms. Harris informed defendant that she was unable to get in touch with her attorneys, the plaintiff, at that time.

Thereafter, at the aforesaid union grievance hearing, defendant knowingly coerced Ms. Harris into entering into the aforesaid settlement by telling her that she must accept defendant's offer now or never.

Ms. Harris thereafter entered into the aforesaid settlement proposed by defendant.

Defendant knew that Ms. Harris was represented by private counsel at the time they entered into the said settlement with her.

Defendant knew that Ms. Harris entered into the said agreement with defendant without the advise of her private counsel, the plaintiff.

Defendant knew that, in exchange for her reinstatement to employment, Ms. Harris gave up her right to seek redress for back pay, lost benefits, compensatory damages, punitive damages and other damages that she would be entitled to recover if she successfully litigated her religious discrimination claim.

Defendant knew that their said settlement proposal did not include any provision to compensate Ms. Harris' attorneys, the plaintiff, for the work it performed on behalf of Ms. Harris.

Plaintiff seeks compensation from defendant for its tortuous interference with the retainer agreement between plaintiff and Ms. Harris, and for its unjust enrichment to the detriment of the plaintiff.

Plaintiff's reasonable attorneys fees for work on religious discrimination cases such as Ms. Harris' are \$250.00 per hour.

### III. ARGUMENT

#### 1. EMPLOYMENT DISCRIMINATION LAWS

Certainly, actions filed pursuant to the federal and state employment discrimination laws are exceptions to sovereign immunity. 42 U.S.C.S. § 2000e et seq. Both the Commonwealth of Pennsylvania and SEPTA can be defendants in employment discrimination cases. Under these state and federal discrimination laws, the aggrieved party has a right to private

counsel. Said private counsel has a right to recover its reasonable attorneys fees earned in representing the aggrieved party. 42 U.S.C.S. § 1988.

As stated in plaintiff's complaint, plaintiffs dual filed a Charge for discrimination with the EEOC and PHRC for religious discrimination stemming from her termination from employment with defendant. Under both Title VII and the PHRA, Ms. Harris had a right to recover lost wages, compensatory damages for emotional pain and suffering, punitive damages and costs, in addition to reimbursement of reasonable attorneys fees.

2. DEFENDANT INEQUITABLY ESCAPED FROM ITS EXPOSURE  
PURSUANT TO THE FEDERAL AND STATE DISCRIMINATION  
LAWS

Although, defendant was aware that Ms. Harris employed plaintiff as her counsel, defendant coerced Ms. Harris into settling her discrimination claim without any consideration for plaintiff's services.

There is no doubt regarding the inequity of this matter, because defendant was able to evade exposure to paying attorneys fees to its great benefits, while plaintiff suffered severe detriment in not being compensated for the work it performed on behalf of Ms. Harris. Finally, it should be emphasized that "the judiciary has long awarded costs through the exercise of its equitable powers." See Pennsylvania Association of State Mental Hospital Physician et al. v. State Employees' Retirement Board et

al., 87 Pa. Commw. 108 (1984); and Sprague v. Tronic National Bank, 307 U.S. 161, 164 (1939).

3. DEFENDANT ILLEGALLY ESCAPED FROM ITS EXPOSURE  
PURSUANT TO THE FEDERAL AND STATE DISCRIMINATION  
LAWS

By coercing Ms. Harris into a settlement without giving her an opportunity to consider the advise of her counsel, plaintiff, defendant was able to eliminate the risk of paying counsel fees under the federal and state discrimination laws.

Defendant was able to get out of the case without having to give any consideration for attorneys fees-- or for that matter, lost wages, compensatory damages for emotional pain and suffering, punitive damages or costs. Such a scenario acts in direct defiance of our civil rights statutes which are designed to enforce the civil rights of protected classes of employees. Certainly, SEPTA's actions were illegal, because even the Commonwealth and SEPTA should not be able to bypass the proper enforcement of these essential and important laws.

If defendant is permitted to get away with this unlawful conduct, the Commonwealth and its various agencies will be given free reign in the future to evade their exposures under the civil rights laws and ensure that they will never again have to pay any attorneys fees, lost wages, compensatory damages for emotional pain and suffering, punitive damages or costs in any matter where

there is a union grievance hearing, so long as they are permitted to bully their union-member employees into giving up their rights at the employee's union grievance hearing. Defendant should not be allowed to do this to anyone-- especially those who are represented by private counsel in discrimination claims.

4. PLAINTIFF'S CLAIM IS NOT PRECLUDED BY SOVEREIGN IMMUNITY

It follows from the above that plaintiff's claims of unjust enrichment and tortuous interference with contract against the defendant are not precluded by sovereign immunity. Since the subject matter of plaintiff's claim involves its claim for attorneys fees related to Ms. Harris employment discrimination claim, the subject matter of this lawsuit is an exception to the sovereign immunity protections granted to the defendant.

Fitzpatrick v. Bitzer, 427 U.S. 445; and Shawer v. Indiana University of Pennsylvania, 602 F.2d 1161 (3<sup>rd</sup> Circuit 1979). As to why state sovereign immunity does not foreclose federal civil rights actions, the Supreme Court reasoned: "a construction of [a] federal statute which permitted a state immunity defense to have a controlling effect would transmute a basic guarantee into an illusory promise . . ." Howlett, 496 U.S. 356.

Moreover, 42 Pa.C.S. § 1726 establishes the standards for imposing costs upon litigants. It states that "attorney's fees are not an item of taxable costs except to the extent authorized

by section 2503." Section 2503 sets forth the rights of participants to counsel fees as part of taxable costs of a matter. It expressly includes "any . . . participant in such circumstances as may be specified by statute heretofore or hereafter enacted." In this case, the relevant statute is 42 U.S.C.S § 1988, which expressly grants reasonable attorney's fees in a federal civil rights case.

The effect of sovereign immunity on these statutes (42 Pa.C.S. § 1726 & § 2503) was addressed in the matter of Baehr Brothers v. Commonwealth, 493 Pa. 417 (1981), in which the Pennsylvania Supreme Court specifically discussed the issue of attorney's fees when the "underlying action" was not barred by sovereign immunity. In Baehr, the court rejected the Commonwealth's argument that the doctrine of sovereign immunity precludes the taxation of costs against the Commonwealth. The Court in Baehr explained that " . . . the legislature has vested this Court with the general statutory power to tax costs to all litigants, 42 Pa. C.S.A. § 1726 . . . The Commonwealth was a party litigant in the underlying action, which no one argues was barred by sovereign immunity . . . Costs, of course, include attorney's fees to the extent authorized by section 2503."

In this case, Defendant does not argue that the underlying action (Ms. Harris's employment discrimination case) was barred by sovereign immunity. As explained in Baehr, because the underlying action was not barred by sovereign immunity, this



action for attorney's fees is also not barred by sovereign immunity.

Defendant's actions of intentionally and knowingly interfering with the attorney-client contract between plaintiff and Ms. Harris and defendant's unjust enrichment to the great detriment of plaintiff still fly in the face of the spirit of the federal and state employment discrimination laws which allow for claimants to be represented by private counsel and be allowed to recover attorneys fees. 42 U.S.C.S. § 1988. If defendant is permitted to bypass having to deal with private counsel, and is permitted to prevent an aggrieved party from consulting with his/her private counsel in the consideration of a settlement of a discrimination claim, then the spirit and intent of the discrimination laws which are designed to keep employers (including the Commonwealth and its various agencies) in check, would be rendered useless.

5. PLAINTIFF'S CLAIM IS NOT PRECLUDED BY THE COLLECTIVE BARGAINING AGREEMENT

Defendant further avers that plaintiff had no legal authority to represent Ms. Harris in the collective bargaining process because the "collective bargaining representative" is the exclusive representative to the "terms and conditions of the employee's employment." While this may be true, the plaintiff did have a right to represent Ms. Harris in her discrimination claim and Ms. Harris had a right to consult with plaintiff prior

to settling her discrimination claim. The defendant's bullying tactics can not be condoned simply because the forum was a union grievance hearing. To condone such tactics would also result in defendant's illegal ability to bypass its exposure to the federal and state employment discrimination laws.

6. PUNITIVE DAMAGES ARE PROPER

Since plaintiff's underlying claim is not barred, as shown above, it follows that plaintiff is also not barred from seeking punitive damages in this case.

IV. CONCLUSION

Wherefore, based on the foregoing, plaintiff should be permitted to proceed with its lawsuit on the merits.

DION& GOLDBERGER

By: \_\_\_\_\_  
SAMUEL A. DION, ESQUIRE  
Attorney I.D. #: 55761  
1515 Locust Street, 10th Floor  
Philadelphia, PA 19102  
(215) 546-6033  
Attorneys for Plaintiff

**UNITED STATES DISTRICT COURT**

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ORDER

AND NOW this \_\_\_\_\_ day of \_\_\_\_\_, 2002, it  
is hereby ORDERED that Defendant's Motion to Dismiss is DENIED.

BY THE COURT:

\_\_\_\_\_  
U.S.D.J.

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CERTIFICATE OF SERVICE

I, Samuel A. Dion, certify that on August 22, 2002, I caused a true and correct copy of the foregoing Amended Response to Motion to Dismiss, by regular first class mail upon counsel for the defendant Justin P. Borkowski, Esq., 1234 Market Street, Philadelphia, Pa. 19107-3780.

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Samuel A. Dion